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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RANDY COOPER, Plaintiff and Appellant, v. LARRY BRANNON et al., Defendants and Respondents.	2d Civil No. B235309 (Super. Ct. No. CV090290A) (San Luis Obispo County)

Randy Cooper appeals a judgment granting summary judgment on his complaint for negligence and premises liability arising from a workplace injury. Cooper contends that homeowners Larry Brannon and Susie Brannon and their company, Brannon, Inc., dba Smith Electric, Inc., (Smith Electric) owed a duty to protect him from falling through an unguarded attic stairwell pursuant to Cal-OSHA regulations. (Cal. Occupational Saf. & Health Act of 1973 (Cal-OSHA); Lab. Code, § 6300 et seq.; Cal. Code Regs., tit. 8, §§ 1632, subd. (b)(1), 3213, subd. (a).) We conclude that the *Privette* doctrine is a complete defense to Cooper's claims against the Brannons and Smith Electric. (*Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*).) Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Larry and Susie Brannon owned a residence. They wished to remodel it for rental purposes. The remodel would include work to convert a large open attic room into bedrooms and a bathroom. Larry Brannon is part-owner and vice president of Smith Electric.

Larry Brannon hired Dream Builders to remodel the residence. Randy Cooper was employed by Dream Builders as a carpenter. Dream Builders is not a party to this action.

Cooper's accident happened about one month into the job. It was the day work began on the attic. There were no rails or guards around the attic stairway opening. As part of the earlier work downstairs, Cooper had reconstructed the stairway.

Before he started work in the attic, Cooper and the owner of Dream Builders discussed the lack of guards or rails around the stairway. The owner of Dream Builders testified, "I believe I said to Randy [Cooper], 'We should put a handrail around the stairway.' And [Cooper] says, 'We're gonna be building the [bathroom] walls around the stairs, you know. What for?' And I agreed. At that point, I said, 'Okay, yeah. We're gonna first build these, so I guess, you know, it's the same thing.'"

About one hour after Cooper started framing the bathroom walls around the stairs, he lost his balance and fell about eight feet down the stairwell. He suffered serious injuries. He was compensated through the workers' compensation insurance fund.

Cooper sued Larry and Susie Brannon and Smith Electric for negligence and premises liability. The Brannons filed a motion for summary judgment on the grounds that they did not owe or breach a duty of care to Cooper. They relied on *Privette*, *supra*, 5 Cal.4th 689 and *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659.

Smith Electric filed a motion for summary judgment on the same grounds, and also on the grounds that it did not own, possess, or control the premises.

In support of the motions, Larry Brannon declared that Dream Builders was the only contractor on the remodel project and Smith Electric had no role in the project except to loan money to the Brannons. He declared that he delegated responsibility for safety of the Dream Builders employees to Dream Builders. The Dream Builders owner offered corroborating testimony. He testified that he was the person responsible for the safety of the Dream Builders employees at the project site.

But Cooper declared that Smith Electric employees participated in the project by doing some work and by delivering materials in Smith Electric trucks. He declared that Smith Electric employees also stored siding materials in the attic before work began there. He declared that Larry Brannon was often on site and occasionally gave directions to the Dream Builders employees. Cooper declared that on one occasion, when the owner of Dream Builders was not present, Larry Brannon directed the Dream Builders employees to retrieve siding materials from the attic.

Cooper offered time records showing the hours worked by a Smith Electric employee on "Larry's house." Cooper also offered invoices and checks that demonstrated that Smith Electric paid for Dream Builders' work.

Cooper offered the opinion of a construction expert who declared that Larry Brannon "was an employer on that job site," and assumed the role of general contractor "in a dual capacity as owner of the property and RMO (Responsible Managing Officer) of the licensed general contractor, Smith Electric . . . who performed much of the work with its employees." The expert opined that when Brannon and Smith Electric directed their employees to store siding materials in the attic, they assumed a duty to protect the employees of all employers on the project site from the unguarded stairwell, under Cal-OSHA's multi-employer worksite rules. Respondents objected to the declaration of Cooper's expert.

Before ruling on the motions, the trial court requested supplemental briefing on "whether regulations cited by plaintiff impose non-delegable duties, and if so, whether any breach of those duties affirmatively contributed to plaintiff's injuries." After supplemental briefing and argument, the court granted both motions. The court did not rule on objections.

DISCUSSION

Cooper contends that, notwithstanding the *Privette* doctrine, there are triable issues of fact whether the Brannons and Smith Electric breached a non-delegable regulatory duty to guard the stairwell opening with railings or other guards pursuant to Cal-OSHA regulations. About four months after the trial court's decision in this case, the Supreme Court decided in *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594 (*SeaBright*) that Cal-OSHA regulations do not impose non-delegable duties upon the hirer of an independent contractor.

The existence of duty is a legal rather than a factual question and is suitable for resolution on summary judgment. (*Parsons v. Crown Disposal Co*. (1997) 15 Cal.4th 456, 464-465.) We independently examine the record to determine whether triable issues of fact exist. (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142.) We view the evidence most favorably to plaintiff and resolve any evidentiary doubts or ambiguities in his favor. (*Ibid*.)

The Privette Doctrine

Generally, an employee of an independent contractor who is injured in the workplace cannot recover in tort from the party who hired the contractor to do the work. (*Privette v. Superior Court*, *supra*, 5 Cal.4th 689.) "[A] person hiring an independent contractor . . . has no obligation to specify the precautions an independent hired contractor should take for the safety of the contractor's employees. Absent an obligation, there can be no liability in tort." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 267.)

There are exceptions to the *Privette* doctrine, for example, (1) when the hirer retains control and affirmatively contributes to injury (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210-212); (2) when the hirer fails to warn of a concealed hazard (*Kinsman v. Unocal Corp.*, *supra*, 37 Cal.4th at pp. 674-675); or (3) when the hirer furnishes unsafe equipment (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225). But there is no exception based on the hirer's violation of Cal-OSHA regulations that were designed to ensure the safety of the employee of the independent contractor. (*SeaBright, supra*, 52 Cal.4th at p. 594.) Cooper mistakenly misquoted the *SeaBright* court as stating, "We hold that the *Privette* rule does not apply in that circumstance." What a difference a word can make. The accurate quotation is, "We hold that the *Privette* rule does apply in that circumstance." (*SeaBright*, at p. 594.)

Cal-OSHA and the Non-Delegable Duty Doctrine

Cal-OSHA regulations require floor openings to be guarded with railings, a cover, or equivalent, to protect workers on a job site from falling through. (Cal. Code Regs., tit. 8, §§ 1632, subd. (b)(1), 3213, subd. (a).) Generally, a plaintiff can rely on statutory or regulatory law to show that a defendant owed the plaintiff a duty of care. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 927, fn. 8.) But, "[b]y hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes *to the contractor's employees* to ensure the safety of the specific workplace that is the subject of the contract." (*SeaBright*, *supra*, 52 Cal.4th at p. 594.) That delegation includes any duty "to comply with applicable statutory or regulatory safety requirements." (*Ibid.*)

Notwithstanding the *SeaBright* decision, Cooper argues that Cal-OSHA duties to provide railings or other guards around open stairways at a workplace are non-delegable. "The nondelegable duties doctrine prevents a party that owes a duty to others from evading responsibility by claiming to have delegated that duty to an independent contractor hired to do the necessary work." (*SeaBright, supra*, 52 Cal.4th

at p. 600.) The doctrine only applies when "the duty preexists and does not arise from the contract with the independent contractor." (*Ibid.*) It does not apply to a hirer's Cal-OSHA duties to employees of an independent contractor because those duties do not predate the contract; rather, they arise out of it. (*Id.* at pp. 601, 603.) Thus, in *SeaBright*, the Supreme Court "reject[ed] the premise that the tort law duty, if any, that a hirer owes under Cal-OSHA and its regulations to the employees of an independent contractor is nondelegable." (*Id.* at p. 601.) Here, too, any tort law duty that respondents owed to the Dream Builders employees existed only because of the work that Brannon or Smith Electric hired Dream Builders to perform. The *Privette* doctrine bars Cooper's recovery even if "the party that hired the contractor (the hirer) failed to comply with workplace safety requirements concerning the precise subject matter of the contract, and the injury is alleged to have occurred as a consequence of that failure." (*SeaBright*, *supra*, 52 Cal.4th at p. 594.)

Cooper argues that, under the multiemployer worksite rule (Lab. Code, § 6400, subd. (b)), respondents' duties were nevertheless non-delegable. The same view was expressed by Justice Werdegar in a lone concurring opinion arguing against *SeaBright* majority's opinion. (*SeaBright*, *supra*, 52 Cal.4th at pp. 606-608 (conc. opn. of Werdegar, J.) But her view was not adopted by the majority. Whether or not the declaration of Cooper's expert on multiemployer worksite duties was admissible, any duties respondents owed Cooper under Cal-OSHA were delegable. Cooper has not presented any competent evidence to rebut the presumption that respondents delegated their duties to Dream Builders when they hired it to perform the remodel. Whether the contract was written or oral is immaterial in view of the presumptive delegation.

Other Exceptions

In the trial court, Cooper also argued that issues of fact exist whether his claims fall within the retained control exception or the concealed hazard exception to the *Privette* doctrine. He did not renew these contentions on appeal. We note that the retained control exception does not apply. Even if Larry Brannon or Smith Electric

retained some control over the project site, there is no evidence that it "affirmatively contributed to the injury of the contractor's employee." (*Hooker v. Department of Transportation*, *supra*, 27 Cal.4th at p. 211.) The concealed hazard exception does not apply because the undisputed evidence established that Cooper was aware of the hazard created by the unguarded stairway. (*Kinsman v. Unocal Corp.*, *supra*, 37 Cal.4th at pp. 674-675.)

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Dodie A. Harman, Judge

Superior Court County of San Luis Obispo

Arnold Henry Lancaster, for Plaintiff and Appellant.

Archer Norris, Gary A. Watt, Teresa Li; Rifenbark & Wolf, Edward O'Connor, for Defendants and Respondents Larry Brannon and Susie Brannon.

Bradley & Gmelich, Thomas P. Gmelich, Lena J. Marderosian, Lindy F. Bradley for Defendant and Respondent Brannon, Inc., dba Smith Electric.